IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1953.

No. 448

EDWARD A. PETERMICHL,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY CO., a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Opinions Below.

In a memorandum and order denying petitioner's motion for new trial, dated December 9, 1952, the trial judge

set forth his reasons for the rulings involved in this appeal (R. 100-103). This opinion, which petitioner neglected to mention, is unreported. The opinion of the Court of Appeals is reported at 205 F. (2d) 434 (R. 112-117).

Jurisdiction.

The jurisdiction of this Court is adequately stated in the petition (ptn. 2).

Questions Presented.

1. Under Illinois law, a person boarding a moving train is contributorily negligent if the act was obviously dangerous and performed without any reasonable necessity, real or apparent. Did the trial court and court of appeals err in holding that petitioner had failed to prove a cause of action when his own evidence showed that, from a position of complete safety on the station platform, he boarded the coach step of a train moving 5 or 6 miles per hour and constantly accelerating, and that the only reason for doing this was that he did not want to wait for a train due a few minutes later?

Respondent contends that reasonable minds could not have differed concerning the obvious danger of, and lack of necessity for, plaintiff's actions.

2. Did the trial court err in refusing to permit petitioner to show that sometimes intending passengers boarded respondent's trains after they had started moving?

Respondent contends that the ruling of the trial court was proper.

3. Did the trial court err in refusing to permit petitioner to show that on other occasions respondent's trains did not accelerate until after the last coach had passed the platform?

Respondent contends that, since petitioner knew that on the occasion in question the train was accelerating before the last coach had passed the platform, it made no difference what happened at other times. For this and other reasons, the trial court's ruling was proper.

4. Does evidence showing that the speed of the train was being accelerated and that petitioner saw no trainmen on the steps as he attempted to board establish what under the Illinois decisions is wilful and wanton conduct, i.e. such an intentional disregard of a known duty, necessary to the safety of the person or property of others, as exhibits a conscious indifference to consequences?

Respondent contends that these facts, either separately or in combination, fall far short of such a showing and hence are not evidence of wilful and wanton conduct under Illinois law.

5. Where, on all the evidence before the court when plaintiff has closed his proof and without weighing the credibility of the witnesses, the only reasonable conclusion is that respondent is not guilty, may a federal trial court direct a jury to return a verdict for the defendant?

Respondent contends that the trial court not only has the power, but also the duty, to direct a verdict in such circumstances.

6. Should this Court review the determination of both the trial court and the court of appeals that under applicable state law plaintiff failed to prove that he exercised due care for his own safety?

Respondent contends that this Court should not be asked to examine, for the third time, a record upon which two

courts have previously agreed, merely for the purpose of giving the defeated party further review.

Statement.

This is an action for personal injuries sustained by petitioner when he flipped onto the bottom steps of a coach in one of respondent's suburban trains as it was pulling out of the station, for an instant stood on the step while catching his breath with parts of his body projecting beyond it, and was brushed off as the train passed a bridge girder, which was located just beyond the station and of whose existence petitioner was well aware. The action was removed from the Superior Court of Cook County by respondent, solely on the grounds of diversity of citizenship. At the close of petitioner's evidence, the trial court directed the jury to return a verdict for respondent and later denied petitioner's motion for a new trial. On appeal the judgment was affirmed.

Although the inaccuracies in petitioner's statement distort the case in many important aspects, a catalogue thereof would substantially lengthen this brief. Such an enumeration is unecessary since the essential facts are well stated in the opinion of the Court of Appeals (R. 113-117). Respondent will, therefore, forego any seriatim statement, relying upon the statement of facts in the Court of Appeals opinion and such specific points as are mentioned during the argument.

ARGUMENT.

Petitioner claims that the Court of Appeals erroneously approved the rejection of his proposed evidence regarding the custom of boarding moving suburban trains and of operating such trains. He also contends that, in affirming the directed verdict for respondent, the court weighed the evidence. The record, however, shows that petitioner's rejected evidence was inadmissible under the applicable law of Illinois and also that the elements of proof necessary to establish a case on which relief could be granted were missing under the same applicable law.

Petitioner's claim that a federal judge lacks power to direct a verdict is unwarranted in view of the repeated affirmations of that power by this Court. Since essential elements of proof were lacking in petitioner's case, this was a proper exercise of that power, not a weighing of the evidence as petitioner suggests.

Finally, this petition contravenes three well defined principles governing petitions for certiorari. First, it asks this Court to re-examine the decisions of two lower courts on a matter of local law. Second, it asks this Court to review concurrent findings of fact by two lower courts. Third, it presents a pure factual situation, not a question of general importance or a conflict of decisions which should be rectified.

I.

The courts below properly applied settled principles of Illinois law in deciding the issues in this case.

This is a common law action for damages because of injuries sustained by petitioner while attempting to board a moving suburban passenger train at respondent's

Maplewood Station, located in Chicago, Illinois (R. 4-8). Respondent removed the action to the United States District Court for the Northern District of Illinois on the grounds of diversity of citizenship (R. 3).

Petitioner contends that the lower courts erred in concluding that he had failed to prove that he was in the exercise of due care and caution at the time of the accident, and that he had likewise failed to prove wilful and wanton misconduct on the part of the respondent. He also claims that it was error to exclude his profferred evidence purporting to show customs and practices with respect to boarding respondent's trains (ptn. 2).

In removal cases, it is unquestioned that the substantive law of the state in which the accident occurred controls the disposition of the cause, *Lemke* v. *Chicago, R. I. & P. R. Co.*, 195 F. (2d) 989 (C. A. 8th 1952); *Roth* v. *Swanson*, 145 F. (2d) 262 (C. A. 8th, 1944); *Flagg* v. *Chicago, G. W. Ry. Co.*, 143 F. (2d) 90 (C. A. 8th, 1944); and *Duluth, W. & Pac. Ry. Co.* v. *Zuck*, 119 F. (2d) 74 C. A. 8th, 1941). Questions concerning the admissibility of evidence in federal courts are governed by Rule 43(a) of the Federal Rules of Civil Procedure. Under this rule, admissibility is determined by federal statutes, federal equity precedents, or the rules of evidence generally applied in the courts of the state in which the federal court is sitting. Since, as we shall subsequently show, no federal statutes or equity precedents exist with respect to petitioner's profferred evidence concerning custom, its admissibility was governed by state law. Thus, all questions raised by petitioner are governed by Illinois law.

A.

Where the evidence showed that petitioner's action was obviously dangerous and without necessity, real or apparent, petitioner had failed to prove a claim in negligence under Illinois law.

Count I of petitioner's complaint sought recovery for several alleged acts of negligence on the part of respondent. Paragraph 4 of this count alleged that petitioner was in the exercise of ordinary care for his own safety (R. 5). In Illinois, freedom from contributory negligence is a necessary element of a plaintiff's case, and the burden is upon the plaintiff to prove it as part of his case in chief. *Illinois Cent. R. Co.* v. *Oswald,* 338 Ill. 270, 274 (1930); *Petro* v. *Hines,* 299 Ill. 236, 238 (1921); *Soule* v. *Chicago & N.W. Ry. Co.,* 175 F. (2d) 424, 426 (C. A. 7th, 1949); and *Swigart* v. *Chicago & N. W. Ry. Co.,* 180 F. (2d) 177, 179-180 (C. A. 7th, 1950).

In the *Swigart* case, the Court of Appeals for the Seventh Circuit passed upon the question of when, under Ilinois law, a plaintiff is contributorily negligent as a matter of law in boarding a moving train. Swigart boarded a train at Waukegan, Illinois, intending to go to Lake Forest, Illinois. When the train stopped at Lake Bluff, Illinois, an intermediate station, Swigart, thinking it was Lake Forest, left the train and walked a couple of steps before he realized his mistake. By that time, the train had started, and Swigart attempted to reboard it. The momentum of the train caused him to loose his grip and fall.

After an exhaustive analysis of the Illinois opinions, the court enunciated the following test of contributory negligence in boarding a moving train, at pages 179-180 of the opinion:

> "The Illinois rule would, therefore, seem to be that while the boarding of a moving train propelled by steam power is not in all cases negligence *per se, it is nevertheless the duty of the court to take the question from the jury where the act is obviously dangerous and without reasonable necessity, real or apparent*" (emphasis supplied).

The court then applied this test to Swigart's conduct as follows (page 180 of the opinion):

> "He was familiar with the operation of trains. After reaching a place of safety on the station platform, he attempted to board the moving train well knowing its speed had been accelerating the length of a car which was approximately 60 feet. The grip of plaintiff's left hand and the strength of his left arm were not available to assist him, because he was carrying a package in that hand, and had his coat draped over his left arm. After taking hold of the left-hand grab iron with his right hand, it was quite natural that the momentum of the train would swing him around with sufficient violence to break his hold and caused him to fall.
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> "Plaintiff was not forced to elect one of alternative dangers. The only necessity or inducement for his action was his personal convenience * * * He pursued a reckless course, and unfortunately suffered serious injuries."

The Court of Appeals then affirmed the judgment n. o. v. rendered in favor of the defendant.

In addition to the *Swigart* case, many Illinois authorities hold that boarding moving trains under various fact

situations is contributory negligence as a matter of law.[1] It is unnecessary to discuss these authorities since petitioner has cited no case tending to show either that the rule is other than that laid down by the *Swigart* opinion or that the *Swigart* case was wrongly decided on its facts (ptn. 12-14). He thus admits that the *Swigart* case was a correct decision under Illinois law. His case in this Court consists of a sophisitic attempt to distinguish *Swigart* v. *Chicago & N. W. Ry. Co.*, 180 F. (2d) 177 (C. A. 7th, 1950) on the facts and thus avoid the finding of the trial court (R. 97-98), concurred in by the court of appeals (R. 114), that Petermichl was even more reckless than Swigart.

1. The evidence shows that petitioner's conduct was obviously dangerous.

Petitioner's statement that the court below rejected his theory of the case is irrelevant (R. 14). A court is not bound to accept a party's theory; its only duty is to apply the applicable law to the facts in the record. Moreover, in contending that Petermichl's act was not obviously dangerous, petitioner abandons his own statement, repeated four times in his complaint, that the accident occurred while petitioner was riding on the coach steps "in an obviously dangerous and exposed position" (R. 5). The

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[1] Among these cases are the following: *Todd* v. *Louisville & N. R. Co.*, 274 Ill. 201 (1916); *Illinois Cent. R. Co.* v. *Cunningham*, 102 Ill. App. 206, 217 (1902); *Ohio & Miss. Ry. Co.* v. *Stratton*, 78 Ill. 88, 94; *Illinois Cent. R. Co.* v. *Slatton*, 54 Ill. 133, 139 (1870); *Walthers* v. *Chicago & N. W. Ry. Co.*, 72 Ill. App. 354 (1897); *Chicago & N. W. Ry. Co.* v. *Scates*, 90 Ill. 586, 592 (1878); *Foote* v. *Chicago, N. S. & M. R. Co.*, 256 Ill. App. 581 (1930).

record supports the statement in petitioner's complaint, not the position taken before this Court (ptn. 11-14).

To appreciate fully the obvious danger of petitioner's actions, it is necessary to have a clear picture of the scene of the accident. Petitioner identified an enlarged aerial photograph (defendant's exhibit 1) as showing the neighborhood in which he lived and the locale of the accident. He placed six numbered pins in this photograph to mark significant geographical points (R. 49). Although omitted by petitioner (R. 137), this exhibit has been transmitted to this Court at respondent's request (R. 138), and we have reproduced it in the appendix to this brief.

As this photograph is bound into the brief, the top is generally north. Along the right side of the photograph are respondent's tracks, running generally northwest to southeast. The yellow pin numbered "1" marks a large "S" shaped apartment building. Petitioner lived in a third floor apartment located at the far end of the most westerly of the two courts thereof. He allowed himself three minutes to go down three flights of stairs, walk north through the court a distance of almost half a block, then east approximately another half block to the corner of Schubert and Rockwell Streets, and thence north along the west side of Rockwell Street under the railway viaduct to a point where he came to the stairway leading west to the ramp and then on up to the station platform. Pin No. 2 indicates the point where petitioner emerged from the court of his apartment building; No. 3 shows the cross-walk at the northwest corner of Schubert and Rockwell Streets where petitioner turned north. No. 4 shows the point on the sidewalk along the west side of Rockwell Street where petitioner saw respondent's train and started to run; No. 5 shows the ramp along which

plaintiff ran, extending from the top of the stairs to the platform; and No. 6 shows the point where plaintiff attempted to board the train. To the southeast of pin No. 6 are the steel girders forming a part of the bridge which carries the tracks diagonally over Rockwell Street. The girder with which petitioner came in contact is the one to the east shown in the right center of the photograph.

The premises in the immediate vicinity of the depot are shown cartographically by plaintiff's exhibit 28. We have reproduced the essential portions of this blue print, drawn to a scale of 1 inch to 10 feet in the appendix to this brief. A study of this print and the aerial photograph shows that petitioner must have run a distance close to 300 feet from the time he first started until he attempted to flip onto the coach steps. A portion of this sprint included climbing fifteen steps and then ascending the ramp. Petitioner estimated that he started to run at 7:32 a.m., two minutes after he left his apartment, and that he ran for about 25 seconds before he put his foot on the coach step (R. 54).

To convey a clearer picture of the stairs, ramp, platform and clearance between the train and the girder, we have also included photographs marked plaintiff's exhibits 11, 4 and 6 in the appendix to this brief.

The foregoing facts show a situation which was much more obviously dangerous than that in the *Swigart* case. In the latter case, Swigart had left the train in no particular hurry and was standing just a few steps away from it at the time it started to move. Being unfatigued from previous exertion, he had merely to turn, wait until the rear end of the coach on which he had been riding approached and attempt to board. On the other hand, it

is amazing that Petermichl actually got close enough to attempt to board the train in the short time he allowed himself to go down three flights of stairs, walk the length of his apartment court, cross Schubert Street, walk and run a block north on Rockwell Street, run up fifteen steps, cross the ramp, and continue running beside the train before thrusting himself onto the bottom step. Yet petitioner persisted in this action, despite the fact that he knew he had only an instant to get onto the steps and pull himself into the body of the car sufficiently to clear the bridge girder. At the same time he knew the train was constantly accelerating. Certainly the conduct of Swigart in deliberately turning and waiting for the entrance to pass him does not compare with that of the racing Petermichl who culminated his fatiguing dash by flinging himself onto the steps of the coach, just short of the threatening girder.

In support of his contention, petitioner's counsel urges that the manner in which petitioner used his hands while getting onto the train, his position on the steps, the acceleration of the train, and his previous experience in flipping trains all show that there was no obvious danger involved in this situation.[2]

With respect to the fact that petitioner's right hand was encumbered so that he was only able to use his left

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[2] In this regard, it is significant that counsel does not assert that petitioner was in the exercise of due care at the time of the accident, nor does he point to any evidence showing due care. Logically, the easiest manner in which to refute respondent's contentions would have been to demonstrate affirmatively the evidence from which due care could have been inferred.

hand in boarding the train, counsel attaches much significance to the fact that Swigart reached across his body to take hold of the left grab iron with his right hand whereas petitioner held this grab iron in his left hand. This is not the basis of the *Swigart* case at all. In the extract from that case previously quoted, the court makes it clear that this was negligent because Swigart did not have the strength of his left hand and arm to assist him. The holding, therefore, is that it is negligence to board a moving train without both hands free.

Petitioner was forty-five years old at the time of the accident and somewhat overweight. being 5 feet 8 inches tall and weighing 179 pounds (R. 33). Although the accident happened in autumn, the record is silent as to whether petitioner was burdened with an overcoat. The record does show that he was encumbered with a leather bag containing a thermos bottle of coffee and lunch, and that he carried a bulky package of drawings. When petitioner finally managed to get his feet on the bottom step of the coach stairs, he stood there a few seconds, holding on with only his left hand (R. 56-59). Then with his left arm, which was somewhat behind him, he tried to pull himself up to a safe position inside the body of the car (R. 38). As the commentator in the annotation entitled: "Moving Train—Attempt to Board", 31 A.L.R. (2d) 931, 972 says:

> "It is evident that one who attempts to board a moving car or train should grasp a handrail or other part of a car to minimize the risk incident to such an attempt, and if he can grasp with both hands instead of one he improves his chances of getting aboard safely."

In this respect Petermichl was plainly not in the exercise of due care, since both hands were not available.

In still another respect, petitioner was more reckless than Swigart. There was no showing that a girder or other obstruction existed near the track in the *Swigart* case or that Swigart knew of one. Here the record shows that petitioner was fully familiar with the location of the bridge girder and the close clearance existing between it and a passenger coach (R. 86). Plaintiff likewise knew that the train had accelerated to a speed of five or six miles an hour in only about the sixty odd feet it moved before he attempted to board it (R. 37). If it continued to accelerate at the same rate, it would have traversed the fifty feet between the point where petitioner boarded and the bridge girder in approximately four seconds. In the face of this known danger, petitioner placed himself on the steps in such a position that parts of his shoulders, buttocks and heels extended beyond the outside edge of the coach and in the path of the oncoming steel girder (R. 56-59). This is the position which petitioner's counsel characterizes as safe (ptn. 12).

In *Plutschow* v. *Metropolitan West Side El. Rys. Co.*, 155 Ill. App. 589 (1910) the plaintiff was held to be negligent as a matter of law when he attempted to board a moving elevated railway train and was brushed against the end of the platform. This is in accord with a number of other authorities which hold that there is contributory negligence as a matter of law in the cases where objects closely adjacent to the track are involved.[3]

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[3] In a number of cases the nearness of adjacent obstructions has been considered in determining the presence of obvious danger: *Harper* v. *Erie R. Co.*, 32 N. J. L. 88 (1866); *Matthews* v. *Central of Georgia*, 46 Ga. App. 699, 169 S.E. 41 (1933); *McLaren* v. *Alabama Midland R. Co.*, 100 Ala. 506, 14 So. 405 (1893); *Berry* v. *Utica Belt Line Street R. Co.*, 181 N. Y. 198, 73 N.E. 970 (1905); *Speaks* v. *Metropolitan Street R. Co.*, 179 Mo. App. 311, 166 S.W. 864 (1914).

Petitioner also asserts that the courts below ignored his testimony with respect to a "sudden" and "unusually rapid" acceleration which swung him from the step. There was no exact testimony to this effect, and the only support in the record therefore is the verbal characterizations of the movement of the train by petitioner and one of his witnesses (R. 38, 84). But adjectives may not take the place of facts, *Chicago, M. St. P. & P. R. Co.* v. *Harrington,* 185 F. (2d) 88 (C.A. 9th, 1950); *Seidenberg* v. *Eastern Massachusetts St. Ry. Co.,* 266 Mass. 540, 165 N. E. 658, 659 (1929). Moreover, petitioner stated that the only effect of this acceleration was to swing his body "just a little bit" (R. 38). If this acceleration had been as violent as contended, the movement would certainly have swung petitioner much more than "just a little bit." As a matter of fact, since the train was operating on a straight track, the only effect of a "sudden and unusual acceleration" would have been to swing petitioner's body not outward but toward the rear of the train.

It is also to be noted that, had petitioner been holding on to the right hand grab iron with his right hand, rather than trying to protect his lunch and drawings, he would have been in an infinitely more secure position to withstand any acceleration which might have occurred. No mention of this fact, or answer to it, is made in the petition.

In an effort to avoid the effect of the foregoing circumstances, petitioner asserts that his actions could not be held to be obviously dangerous since he had flipped suburban trains at this station before (ptn. 13). Under Illinois law, this is not a valid argument. In *West Chicago Street Railroad Co.* v. *Torpe,* 187 Ill. 610 (1900),

the Illinois Supreme Court held that evidence of a custom of slowing up at the point involved to permit passengers to board was inadmisible. The court said at page 613:

> "If it were admitted that such custom did exist and the deceased knew the same, such facts would not justify the deceased in attempting to mount a cable train running at full speed past said point, even though the same was so run in disregard of said custom."

Petitioner himself testified that before he attempted to board he knew that in a little over a car length the train had accelerated from a standing position to about six miles per hour, was accelerating, and would continue to accelerate (R. 60-61). Even assuming there were such a practice as petitioner claimed he had observed, it would not, under the *Torpe* case, have justified petitioner's performing the obviously dangerous act of leaving a safe platform and boarding a rapidly accelerating train. As the Illinois Supreme Court has said in *Carrell* v. *New York Cent. R. R. Co.*, 384 Ill. 599 (1944) at page 604:

> "No one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care."

As we have demonstrated, the instant case contains the same elements as those which led the Court of Appeals to conclude that the actions of the plaintiff in *Swigart* v. *Chicago & N. W. Ry. Co.*, 180 F. (2d) 177 (C. A. 7th, 1950) were obviously dangerous. Additional elements reinforce this conclusion. Therefore, the action of the court below was proper unless petitioner could have shown some necessity for boarding the train.

2. Petitioner had no reasonable necessity, real or apparent for boarding the train while it was in motion.

Petitioner makes no attempt to show any necessity for his attempt to board the train. The excerpt from the *Swigart* case previously quoted indicates that the test of necessity is whether a choice between alternative dangers appeared to be required. Petitioner admitted that until he stepped to the coach he was in a position of perfect safety (R. 87). He could not argue that any serious consequences or even inconvenience would have ensued had he not attempted to take that train. Through years of commuting from Maplewood Station, petitioner knew there would be another train along in a little while which he sometimes took to work. He also knew that street cars and busses were available as alternative means of transportation (R. 85-86). The Court of Appeals therefore fittingly observed that its language in the *Swigart* case to the effect that plaintiff there acted for his own convenience was applicable to petitioner in this case (R. 114).

B.

Petitioner's proof of custom was properly rejected by the courts below.

Petitioner contends that this Court should grant a writ of certiorari to review the determination of the Court of Appeals that the trial court correctly excluded his proposed proof that men and women customarily boarded respondent's trains as they pulled out of the station, apparently with the knowledge and consent of the defend-

ant's agents (ptn. 14-19).[4] The admissibility of this evidence is determined under Federal Rule of Civil Procedure 43(a) which provides that evidence shall be admissible in a federal court where a state statute, a federal equity precedent, or the general rules of evidence of the state in which the court sits provide for such admissibility.

Petitioner advances no federal statute governing the admissibility of such evidence. He does claim, however, that such evidence was admissible under *Fiedler* v. *Chicago & N. W. Ry. Co.*, 204 F. (2d) 515 (C. A. 7th, 1953). The *Fiedler* case was not an equity precedent, being an action at law for personal injuries in which jurisdiction was based upon diversity of citizenship. In ruling on the significance of custom in that case, the court cited no federal equity precedent. Although the Court of Appeals held that its decision in the instant case did not conflict with its decision in the *Fiedler* case, if there were such a conflict, the *Petermichl* case, being a later decision of the same circuit, would impliedly overrule the *Fiedler* case and the conflict would furnish no grounds for review by this court. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, (Wolfson & Kurland, ed.) 668.

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[4] Petitioner's offer of proof did not preserve any substantive issues for review since it was largely a statement of legal conclusions, intermixed with a few facts. Rule 43(c) of the Federal Rules of Civil Procedure requires specific offers of proof, and offers to prove conclusions have been repeatedly rejected, *Romine* v. *City of Watseka*, 341 Ill. App. 370 (1950); *Harman* v. *Indian Grave Drainage District*, 217 Ill. App. 502, 510 (1921) and *Court of Honor* v. *Dinger*, 123 Ill. App. 406, 417 aff'd 221 Ill. 176.

Actually the *Fiedler* case is not applicable since the role of custom in the two cases is quite dissimilar. In the instant case custom was offered for the purpose of proving implied invitation, an alleged alternative justification for a dangerous act. In the *Fiedler* case, custom was not necessary to prove knowledge of Fiedler's position and a failure to prevent him from occupying that position by the railroad's agents, since the evidence showed that the conductor actually saw Fiedler get up from his seat and walk onto the front platform while the train was still moving.

Moreover, a number of railroad employees followed the same practice as Fiedler in leaving the train, and direct encouragement could also be found in that action. It is also clear that this was a custom generally followed by all passengers on the train, not a course of conduct followed by a few reckless individuals when they arrived at the station as the train was leaving.

Since the role of custom was different in the *Fiedler* case and the knowledge of the railroad of that custom was established directly, the *Fiedler* case contained the special elements of proof of custom not present in this case which account for the difference in result.

Respondent does not seriously contend that admissibility in this case is governed by anything but Illinois law; neither does he contend that the applicable Illinois law is contained in any other authorities than *North Chicago St. R. R. Co.* v. *Kaspers,* 186 Ill. 246 (1900) and *South Chicago City Railway Co.* v. *DuFresne,* 200 Ill. 456 (1903). He merely states that both the trial court and the court of appeals misapplied these cases. Such is not the case. In the *Kaspers* case, immediately preceding the

language cited by petitioner (ptn. 15), the court indicates that the knowledge of such a custom must be actual, not merely implied, by saying that the evidence showed that defendant's conductors had encouraged this practice by telling passengers to come on and aiding them to get on. Absent such active encouragement, the court said at page 249 of the opinion:

> "It is not competent to show, as an excuse for an act of negligence, that others are accustomed to be equally negligent."

In the *DuFresne* case it was held error to admit evidence of such a custom, the court differentiating the *Kaspers* case on the ground previously set forth. The court said that for the rule of the *Kaspers* case to apply, "there must be some concurrence by the railroad company in the practice, and not a mere failure to prevent acts of negligence or to compel the public to use prudence and caution for their own safety." This latter, at best, was all that petitioner's proposed proof could possibly show.

In the absence of federal statute or equity precedent, this state exclusionary rule was properly applied under Rule 43(a), *Wright* v. *Wilson*, 154 F. (2d) 616 (C. A. 3rd 1946); *Freedom Casket Co.* v. *New York Life Ins. Co.*, 88 F. (2d) 833 cert. den. 301 U.S. 693; and *Frenzen* v. *E. I. DuPont DeNemours & Co.*, 51 F. Supp. 578 (1943). Moreover, the admissibility of evidence is within the discretion of the trial court, *Lavendar* v. *Kern*, 327 U.S. 645, 654 (1946); *New York, N. H. & H. R. Co.* v. *Zermani*, 200 F. (2d) 240 (C. A. 1st, 1952); and *Sivert* v. *Pennsylvania R. Co.*, 197 F. (2d) 371 (C. A. 7th, 1952). Petitioner has shown no abuse of that discretion.

C.

Petitioner fails to establish a case of wilful and wanton conduct under Illinois law.

On the basis of respondent's operating rule 940 which requires trainmen to take positions on the coach steps on the platform side when starting from stations and on the basis of petitioner's alleged custom of boarding moving trains, petitioner argues that wilful and wanton conduct was established; that had such employees been stationed on the steps, they could not have failed to see petitioner and could have forestalled any sudden acceleration (ptn. 19-21).[5] In so arguing, petitioner grossly misstates the evidence. In the first place, the evidence does not show that the trainmen were not in their proper positions. The only testimony is that petitioner did not see one. It is apparent that there were at least seven cars on the train, with entrances at each end of each car. The court can take judicial notice of the fact that a train crew consists of a conductor and two crew men; obviously every entrance could not be covered. Likewise, counsel's statement that the crewmen could have effectively communicated with the fireman in the few seconds between the time petitioner boarded the train and the time it reached the girder is unsupported by the evidence. Fi-

[5] At the outset of his argument on this point, petitioner refers to the verdicts of the juries on the three previous trials (ptn.19). These are without significance for the reasons set forth in the opinion of the Court of Appeals (R. 114). Moreover, since the records of the former trials differ greatly from the records herein and were not included in the record there is no way of knowing what differences in the evidence accounted for the differences in results.

nally, the language of Rule 940 merely requires trainmen to warn persons in petitioner's situation against making such attempts. Petermichl, who saw no danger in boarding a moving train, could not have been restrained from boarding that train by anything short of physical violence.

We submit that as a matter of law, no wilful and wanton conduct was established. Illinois courts have held that it is not wilful and wanton conduct to violate a statute or ordinance, *Bartolucci* v. *Falleti*, 382 Ill. 168, 175 (1943) and *Gulf, M. & O. Ry. Co.* v. *Freund*, 183 F. (2d) 1005, 1010 (C. A. 8th, 1950) (applying Illinois law). It would follow, as was held in *Louisville, N. A. & C. Ry. Co.* v. *Wurl*, 62 Ill. App. 381, 385 (1896), that violation of a company rule in itself would not establish such conduct. Moreover, the test of wilful and wanton conduct, in Illinois, is whether there is an intentional disregard of a known duty, necessary to the safety of the person or property of others, such as exhibits a conscious indifference to consequences, *Bartolucci* v. *Falleti*, 382 Ill. 168, 174 (1943); *Mower* v. *Williams*, 402 Ill. 486, 489 (1949); and *Schneiderman* v. *Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946). Under Illinois law, negligence and wilful and wanton conduct are not synonymous, the latter requiring additional elements of proof. *Bartolucci* v. *Falleti*, 382 Ill. 168, 175 (1943); *Gately* v. *Chicago & E. I. R. Co.*, 138 F. (2d) 222, 227 (C. A. 7th, 1943); and *Provenzano* v. *Illinois Central Railroad Co.*, 357 Ill. 192, 196 (1934). Yet even the alleged failure to see the petitioner was not negligence as a matter of law. It is generally true that everyone has the right to assume that others will exercise due care and caution for their own safety until the contrary affirmatively appears. As has been amply demonstrated, petitioner's act was obviously

dangerous, and certainly the crew had the right to assume, at least until he started to board, that the danger would become apparent to him and he would wait for the next train. In *Atchison T. & S. F.* v. *Calhoun*, 213 U.S. 1, 10 (1909), this Court said:

> "No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train has started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity..."

See also, *Palen* v. *Wheelock*, 13 F. (2d) 34 (C. A. 8th 1926) (applying Illinois law).

Nowhere in his argument concerning petitioner's freedom from contributory negligence does counsel at any time affirmatively show any facts proving such an exercise of due care, nor does he even state that petitioner was in the exercise of due care. In such a case, it is easy to understand why counsel seeks to bring himself within the rule that where wilful and wanton conduct is proved contributory negligence does not bar recovery. Even with the benefit of all reasonable inferences, no such conduct has been shown.

II.

Since petitioner had not introduced sufficient evidence to prove the elements of his case, the trial court properly directed a verdict.

In an effort to elevate a purely factual personal injury case to the dignity of one of general importance and thereby persuade this court again to review the evidence, petitioner advances the theory that the Court of Appeals weighed the evidence in this case and has adopted such a practice generally (ptn. 6-8). As an example of this

practice he cites *Spikings* v. *Wabash R .Co.*, 201 F. (2d) 492 (C. A. 7th, 1953) cert. den. 345 U.S. 992. It is significant that the same claim was made in the petition for certiorari in the *Spikings* case, and, while counsel for respondent is aware of the proper significance to be attached to a denial of a petition for certiorari, nevertheless, in view of this Court's well known attitude toward the right of trial by jury, the denial of certiorari in that case should be persuasive as a rebuttal of petitioner's claim.

In the instant case, the language of the opinion (R. 112) indicates that the Court of Appeals was extremely conscious of the fact that it was reviewing a motion for a directed verdict. It is not reasonable to assume that three experienced appellate judges would make such observations without being conscious of the rules governing the review of such questions. Moreover, as the preceding section of this brief has shown, facts which were fatal to petitioner's sustaining his burden of proof were present in the record so that the decisions of the courts below were clearly correct under the applicable law.

In order to soften the impact of the foregoing facts, petitioner attempts to gain comfort from a supposed serious doubt concerning the power of a federal trial judge to direct a verdict. He also relies upon a number of cases arising under the Federal Employers' Liability Act, 45 U. S. C. par. 51 *et seq.* The short answer to petitioner's contention is that this Court, in promulgating the Federal Rules of Civil Procedure, specifically authorized such a motion in Rule 50(a). The majority opinion in *Galloway* v. *United States*, 319 U. S. 372, 389 (1943)

passed squarely upon this point when the Court said:

> "If the intention is to claim generally that the (seventh) amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure."

No claim that a federal court lacks the power to direct a verdict for insufficient evidence has ever been seriously entertained even under the F.E.L.A. In fact, cases under that act have unequivocally expressed exactly the opposite rule. This court affirmed *Eckenrode* v. *Pennsylvania R. Co*, 164 F. (2d) 996 (C. A. 3rd, 1947) in 335 U. S. 329, where the court of appeals said at page 997 of the opinion:

> "We recognize that the plaintiff is entitled to the most favorable interpretation of the facts in her favor and all the inferences which may reasonably be drawn from the facts established by the evidence as viewed in the light most favorable to the plaintiff's case. But with all of that in mind, we still conclude that there is no evidence on which a recovery based upon negligence on the part of the defendant can be sustained."

In *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U. S. 573 (1951) this Court specifically approved the direction of a verdict in an F. E. L. A. case, and in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 61-63 (1949) the suggestion that such a power was lacking was emphatically rejected. Probably the words of the majority of this Court in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479 (1943) most succinctly state the rule manifestly applicable to this case:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one

reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. *By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims''* (emphasis supplied).

III.

This petition seeks a second appellate review of a factual determination concurred in by two courts applying undisputed local law.

As has previously been shown, all of the substantive issues in this case involve matters of local Illinois law. The applicable law is admittedly well settled on the questions involved. Since the trial judge and two of the three judges of the Court of Appeals are Illinois lawyers of long experience, one of them being a former judge in Illinois courts,* it is plain that they were thoroughly familiar with it. Under these circumstances, the petition asks this court to disregard the principle enunciated as

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* Judge William J. Campbell, the trial judge, was admitted to the Illinois bar in 1926, and engaged in the active practice of law until his elevation to the bench in 1940.

Judge Philip J. Finnegan was admitted to the Illinois Bar in 1913 and engaged in the practice of law until his elevation to the bench as a judge of the Municipal Court of Chicago in 1922. In 1929 he was elevated to the Circuit Court of Cook County, Illinois where he served until his appointment to the Court of Appeals in 1949.

Judge Walter C. Lindley was admitted to the Illinois Bar in 1904 and practiced law in Danville, Illinois until his elevation to the bench of the U. S. District Court for the Eastern District of Illinois in 1922. He presided in that court until his appointment to the Court of Appeals in 1949.

follows by Mr. Justice Reed in *Propper* v. *Clark*, 337 U. S. 472, 486 (1949):

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts schooled in the law of the particular states unless their conclusions are shown to be unreasonable."

Enforcing the same principle, this Court rejected an argument that the court of appeals involved was incorrect in determining that a certain case was the controlling precedent on a matter of state law. In so doing, the court commented on the persuasiveness of the views of the judges of the district courts and courts of appeal on such matters because of their experience with local precedents. *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630 (1946). This policy was reaffirmed and again followed in *Estate of Spiegel* v. *Comm'r*, 335 U.S. 701, 707-708 (1949), the Court commenting on the wide experience of one of the judges as a member of the Illinois bar. The principle is applicable here.

This petition also ignores the principle that where the trial court and the court of appeals have concurred in their findings of fact, this Court will regard them as final in the absence of a very special showing of error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214 (1948); *Faulkner* v. *Gibbs*, 338 U.S. 267 (1949); *Allen* v. *Trust Co.*, 326 U.S. 630, 636 (1946); and *Williams Co.* v. *Shoe Mach. Corp.*, 316 U.S. 364, 367 (1942). Significantly, petitioner failed to call this Court's attention to the memorandum of the trial court in denying the motion for new trial in this case. A comparison of this memorandum (R. 100-103) with the opinion of the court of appeals (R. 112-117) indicates the agreement between the two tribunals as to the facts in this case. As a matter of fact, the lat-

ter opinion approves and adopts many of the facts as found in the former memorandum. As has been shown in the first section of this brief, granting the writ would entail only another review of these facts.

Finally, this petition does not fall within the purpose of certiorari jurisdiction as frequently expressed by this Court. In *Magnum Co.* v. *Coty,* 262 U.S. 159 (1923) Chief Justice Taft, speaking for the court, said at page 163:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes, the first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred on this Court to give the defeated party in the Circuit Court of Appeals another hearing"* (emphasis supplied).

Adherence to this principle has led this Court to dismiss writs of certiorari as improvidently granted when it became apparent that no issue of general importance was involved, *Layne & Co.* v. *Western Well Works,* 261 U.S. 387, 393 (1923), or to refuse to decide non-certiorari issues, *Liberty Oil Co.* v. *Condon Bank,* 260 U.S. 235 (1922). As a matter of local law is involved here, there can be no conflict between the circuits. Likewise, it has been demonstrated that there is no conflict between the decision in this case and those of the Supreme Court of Illinois. The only thing involved here is its applicability to a particular set of facts; no additional light upon the applicable principles of law can be shed by further analysis of the specific facts. As was stated in *General Pictures Co.* v. *Electric Co.,* 304 U.S. 175, 178 (1938):

> "Granting the writ would not be warranted merely to review the evidence or inferences drawn from it."

Conclusion.

Petitioner's real basis for certiorari is apparent in his selection of facts with which to begin his statement (ptn. 2). He initially calls this Court's attention to petitioner's admittedly grave and disabling injuries in the hope that the sympathy of this Court will be invoked thereby. The fact remains that the decision below was clearly correct. The orderly administration of justice requires the denial of certiorari in a case where its allowance would clearly contravene so many of the enunciated principles governing the issuance of the writ. The writ of certiorari herein prayed for should be denied.

Respectfully submitted,

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APPENDIX A.

REPRODUCTIONS OF EXHIBITS.

The reproductions of the exhibits are inserted in the following order:

Defendant's Exhibit 1.

Plaintiff's Exhibit 11.

Plaintiff's Exhibit 4

Plaintiff's Exhibit 6.

Plaintiff's Exhibit 28.